officer while in office, and which he subsequently fails to account for and pay over: *Bryan* v. *The United States*, 1 Black U. S. 140; 12 Wheat. 505.

When an officer tortiously seizes goods, it is not merely a private trespass, but a breach of his bond; and a person whose goods are thus wrongfully seized should have an action against him and his sureties on his official bond: *State* v. *Moore*, 19 Mo., *supra*, 21 Mo. 160; *The People* v. *Schuyler*, 4 Comst. 173; *Archer* v. *Noble*, 3 Greenl. 418; *Harris* v. *Hawson*, 11 Me. 241; *Carmack* v. *Com.*, 5 Binn. 184; *Com.* v. *Stockton*, 5 Monroe 192; *Phillips* v. *Harris*, 3 J. J. Marsh. 122; *Potts* v. *Com.*, 4 Id. 202; *Forsythe* v. *Ellis*, 4 Id. 298.

The judgment is affirmed.

HOLMES, J., concurred. LOVELACE, J., was absent.

Supreme Court of Pennsylvania.

JOHN B. HAUSER AND DANIEL BUSER *v.* THE COMMONWEALTH OF PENNSYLVANIA.

Jurors are competent witnesses both in civil and criminal cases.

The journal which the warden of a prison is by law required to keep is not a technical record in such sense as to be the exclusive evidence of the fact that defendant was in a certain prison at a certain time.

Where a witness had been twice convicted of an infamous offence, but exhibits a pardon for the second conviction, and says, on examination by the defendant, that he has been pardoned also for the first, the defendant cannot assign as error that the fact of such first pardon was improperly proved.

A witness who, though not formally impeached, testifies under circumstances tending to discredit him, has a right to detail facts otherwise irrelevant which corroborate his statements.

On a trial for murder, where it has been shown that the prisoner spoke of an intention to rob the murdered person and if necessary to murder her, the prosecution may show that the murdered person had money before her death and that none had been found by her administrator after the murder; and the administration-account is competent evidence of the latter fact.

ERROR to Oyer and Terminer of *Cambria county.*

The opinion of the court was delivered by

WOODWARD, C. J.—Polly Paul, an elderly maiden lady, who was reputed to possess money, and Cassie Munday, a young girl who lived with her, were both cruelly murdered on the evening

of the 7th June, 1865, in Summerhill township, Cambria county. The plaintiffs in error were defendants below, in an indictment which charged only the murder of Miss Paul, and after a full and careful trial were both convicted of murder in the first degree. The evidence was circumstantial. A great number of independent and connected facts were proved, and were so placed before the jury by the learned judge who presided at the trial, that no exception was taken in his charge, and consequently no question arises out of his instructions to the jury for our consideration upon this writ of error. But several bills of exception to evidence were sealed, and these are assigned for error. Although the evidence, as a whole chain, led irresistibly to the conclusion of guilt, yet, if any material link of it was defective, and such as ought to have been rejected, the prisoners have good right to complain in this court. Let us therefore carefully examine the errors assigned, to see if any of them are well founded.

The 1st and 9th errors complain of the admission of John Buck and George W. Kirby, two of the jurors in the box, as witnesses on the part of the Commonwealth. In respect to the first of these witnesses it might be sufficient to say that the objection was not made until after he was sworn as a witness, when it was too late to object to his competency, and in respect to both it might be said that they were called to incidental and comparatively immaterial points that did not touch the *corpus delicti;* but waiving these answers, let it be distinctly said that jurors are not incompetent witnesses in either criminal or civil issues. They have no interest that disqualifies, and there is no rule of public policy that excludes them. On the contrary, it has been our immemorial practice to examine jurors as witnesses when called by either party. It is sanctioned by Archbold, see Evidence, vol. 1, p. 151; was recognised in principle by us in *Plank Road* v. *Thomas*, 8 Harris 92, where a viewer was held to be competent, and is regulated by the 158th section of the Act of Assembly of 14th April 1834, relating to juries, Purdon 586, which requires every juror impannelled in any cause to disclose his knowledge of anything relative to the matter in controversy, in open court, before the jury retires to make a verdict. The learned counsel argued that the practice violates the constitutional right of the accused, who are entitled to a speedy and public trial by an *impartial* jury, and to be confronted with the witnesses. Our

law takes the utmost care to secure to the accused in capital cases an impartial jury; it almost allows prisoners to select their own triers. They may examine jurors as to their knowledge of circumstances, their expressions, opinions, or prejudices, and challenge as many as they can show cause against, and may challenge twenty without showing cause, and then, if any juror happens to have knowledge of any pertinent fact, he is bound to disclose it in time for the accused to cross-examine him, and to explain or contradict his testimony. If this be not a fulfilling of the constitutional injunction in behalf of impartial juries it would be difficult to invent a plan that would fulfil it, and at the same time be consistent with the demands of public justice.

But counsel imagine that the constitutional right to confront witnesses would be abridged in the instance of witnesses taken from the jury-box, because their truth and veracity could not be attacked without damage to the attacking party. As to material witnesses,—those, we mean, upon whose testimony the event is essentially dependent,—we think they ought not to be admitted into the jury-box, and we believe the general practice is to exclude them where the fact is discovered in time; but we do not think the constitutional provision alluded to, nor any rule of law, is violated by the examination of a juror as a witness. The *à priori* presumption is, that he is a man of truth and veracity, or he would not have been summoned as a juror, and *confronting* witnesses does not mean impeaching their characters, but means cross-examination in presence of the accused.

When the common law of England was transported to these colonies, it gave a person charged with a capital crime no compulsory process to obtain witnesses, and entitled him to no examination by himself or his counsel of witnesses brought against him. As Queen Mary said to her Chief Justice, Sir RICHARD MORGAN, "It did not admit any witness to speak, or any other matter to be heard in favor of the adversary, her majesty being party." To remedy this state of the law our constitutions all declared, what statutes had then provided in England, that the accused should have an impartial trial by jury, should have process for witnesses, and be entitled to counsel to examine them, and to cross-examine those for the prosecution in the presence of—*confronting*—the accused.

And this is now our inflexible rule. I have known one case in

which a great question was made, whether a magistrate's written examination of a prisoner, who afterwards broke jail and escaped, was evidence against a confederate, under the provisions of the statute of 2 & 3 Philip & Mary, ch. 10. The case did not reach this court, though the opinions of some of the then judges were taken, and it was finally decided that, notwithstanding the above-named statute had been extended to Pennsylvania, it was displaced by our constitution, and that no *ex parte* testimony could be given against a prisoner in a capital case.

Such, then, is the meaning of the constitutional provision which counsel invoked, and it is impossible to apply it to exclude a juror witness. He, like all other witnesses, must "confront" the accused; that is, be examined in the presence of the accused, and be subject to cross-examination, but he is not disqualified to be a witness.

It became necessary for the Commonwealth to show, in the course of the trial, that the prisoner had been in the Western Penitentiary, and in intercourse with other prisoners there, and particularly one Philip Folgart, a convict, sent from Cambria county, and from whom the prisoner heard of Miss Paul, the theory of the prosecution being that the prisoners had plotted the robbery and murder of Miss Paul whilst in prison, and that they proceeded to execute the plot as soon after their enlargement as circumstances permitted.

Sheriff Buck, who took Folgert to the penitentiary, was called to prove that fact, and David McKelvy proved that the defendants had been in the penitentiary, and fixed the time of their discharge. This testimony was objected to, and forms the basis of the 2d and 4th assignments, because the warden of the Penitentiary is required, by the Act of Assembly of April 23d 1829, Purdon 651, to keep a journal, in which the reception and discharge of prisoners is regularly entered, and that record, it is argued, was the best evidence of the facts to which these witnesses swore.

The Act of Assembly does not make the warden's journal a record, nor declare that it shall be evidence of the facts therein entered. The main purpose of keeping it is to inform the inspectors of the prison of the name, age, condition, and circumstances of each prisoner, that their duties may be intelligently performed. If the question had been whether Folgart and these defendants

had been legally incarcerated, it might have been necessary to show every formality prescribed by law, but the main point was the conspiracy to rob and murder, and the fact of their being together in the penitentiary was only incidental or introductory to that point. Says Mr. Greenleaf, vol. 1, p. 68, where the record or document appointed by law is not a part of the fact to be proved, but is merely a collateral or subsequent memorial of the fact, such as the registry of marriages, births and the like, it has not an exclusive character, but any other legal proof is admitted. If the marriage or birth of the prisoners had been wanted as introductory to evidence of the crimes charged, it would scarcely be argued that a witness who was present at the birth or marriage was incompetent to prove it because a registry existed. In questions of identity, records and registries are not the best evidence, for after the entries in them are received, it is necessary to individuate the persons mentioned, and this must be done by evidence *dehors* the document. We have an illustration in the 3d error assigned, which complains of the admission of the record of Folgart's conviction and sentence without identification of his person. We do not mean to say that we considered the 3d assignment any better than the 2d and 4th, but simply that it illustrates the necessity to add even to a judicial record, oral evidence of identification. The record proved Folgart's conviction and sentence, and Sheriff Buck identified him as the individual he took to the penitentiary, whilst McKelvy identified the defendants on trial as inmates of the prison. We cannot be persuaded that there was any error in submitting such evidence to the jury. The 5th assignment relates to the witness, William McCreary. When this individual was called by the commonwealth, he stated in answers to questions by the prisoners' counsel, that he had recently got out of the penitentiary, where he had been confined on a conviction for burglary; that he had been in before on a similar charge and had been pardoned, and that the pardon was in Washington county. The counsel for the commonwealth then exhibited an executive pardon for the last offence, and the court admitted the witness. This is assigned for the 5th error.

If the pardon exhibited did not cover the first as well as the last conviction (of which we cannot judge, for the pardon is not shown to us), the fact that he had been pardoned for the first

offence was elicited by the examination of the defendants' counsel, and it is not for the defendants to object that the fact was improperly proved. Both pardons were sufficiently proved, to justify the court's admission of the witness. And we think there was nothing in the testimony of this witness on which to ground the 7th and 8th assignments of error. He was permitted to explain the situation and relation of the cells, and the arrangements made of prisoners, to show what opportunities he possessed of acquiring knowledge of the facts he detailed.

And when he was recalled, he was permitted to detail what occurred when Messrs. Noon and Johnson visited him in his cell; that he showed them how communications between adjoining cells could be made, and he was permitted also to testify that no promise of a pardon or other inducements had been held out to him to testify in this case. All this was objected to because it tended to corroborate the witness, when no attempt had been made to impeach him, and the question about a pardon compelled the witness to discredit himself or commit perjury if such promise had been held out.

Though not formally impeached, this witness as a pardoned convict testified necessarily under circumstances that tended strongly to discredit him. The jury would inevitably regard his testimony with suspicion. It was very proper therefore to corroborate him, and surely if he could demonstrate to his visitors that communication between cells was possible, he had a right to prove the fact in corroboration of his statement that such communications had actually taken place. And he was entitled also to the fact that no inducement had been held out to him to testify against the defendants. These were rights of the witness, and he was in circumstances to justify his claim of them and the court's concession of them. The communications of prisoners among themselves about "points" to be made when they get out is not the most satisfactory kind of evidence, especially when proved only by one of their number, pardoned for the purpose of being made a witness; but the credibility of this witness was fairly submitted to the jury, and there were many circumstances in proof by other witnesses that tended strongly to corroborate him. True, the testimony was most damaging to the defendants, if believed, but the commonwealth was entitled to lay it before

the jury; and it is not for us to doubt that the jury scanned it closely, and gave it no more weight than was due to it.

The 6th error is founded on the declarations of Mary Stipoliski made to her parents the evening of the murder. This little girl had been sent at nightfall to fetch home the cows, and when she came home she told her parents what she saw and heard, and that she thought the men she saw at Polly Paul's were not the right kind of persons.

In itself considered, this evidence was of little importance, for it did not lead even to an early discovery of the murder. Nobody seems to have attended to the girl's story, and it might be considered irrelevant and harmless evidence if subsequent discoveries had not shown that these defendants were prowling about the neighborhood, and were the very two men the little girl saw at Miss Paul's. The fact that she saw men there and heard sounds of distress was competent and relevant, and it was rendered no less so by the additional facts that she told it to her parents directly she returned home. This circumstance she had a right to refer to, as refreshing her memory. And what her parents said in reply was also a circumstance to refresh her memory. The damaging part of this evidence does not consist in the narrative that burst from the lips of this little girl on her return home, much less in the responses of the parents, but it consists in the facts themselves, to which she swore on the trial, and which interweave themselves with facts furnished by other witnesses in such a manner as to form what the jury considered a web of guilt. The facts, that is, what she saw and heard, are not objected to as improper evidence, but only her relation of the facts to her parents, and their replies. Ordinarily, declarations of third parties, in the absence of the accused, are not evidence, but these declarations were so connected with the circumstances as to become a part of them—or, if they cannot be so considered, they were immaterial and harmless, and therefore form no ground for reversing.

The 10th assignment relates to the administration account of the estate of the deceased. It was a public record, and we think properly admitted. It is usual to prove the circumstances of the decedent's estate, where the murder was committed *lucri causa*, and the administration account is the best possible evidence of what personal estate was possessed. If it failed to show a per-

sonal estate which other evidence proved to have belonged to the deceased, and the commonwealth was thus enabled to furnish the jury with an inference of robbery, it was an inference to which the commonwealth was entitled. A lone woman, shown to have had money, is foully murdered, and her administrator finds no money to administer. When men are on trial for her murder who spoke of making a point to rob her, and if necessary murder her, and who spoke also of the "pile" they expected to obtain, we think it was competent to show by the public records that her personal representative found no money.

As to the overruling the motion for a new trial, it is not a proper subject for an assignment of error. The discretion of the court is not reviewable here. Nor is the complaint that the court misapplied its own rule of practice, a matter of which we can take notice. The rule is prescribed by the court itself, to regulate its own discretion, and the refusal to grant a new trial is an exercise of discretion with which we cannot interfere, whether it conformed to the rule of court or disregarded it.

We have thus gone carefully through the several errors assigned upon this record, and finding no one that would justify us in reversing the judgment, it must stand affirmed.

Supreme Court of Indiana.

McDONALD ET AL. *v.* McDONALD.

Where land is paid for jointly by A. and B., and the deed is made to A. alone, under such circumstances that a trust, not within the Statute of Frauds, would result by implication of law in favor of B., the character of such trust is not altered by an express verbal agreement or by a declaration of A. that he holds the land subject to such trust; and therefore it may be proved by parol.

A trust implied by law from a given state of facts, is not brought within the Statute of Frauds so as to require to be proved by written evidence, by the declaration of the trustee that he holds subject to such trust.

ACTION of partition. The facts sufficiently appear by the opinion of the court, delivered by

FRAZER, J.—The plaintiffs and defendants were the heirs at law of Patrick McDonald, deceased. The defendants, who are appellants here, claim each one-third of the land by answer, in